UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN CHAMBERLAIN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. REDDY ICE HOLDINGS, INC., *et al.*, Defendants.	)	Civil Action No. 2:08-cv-13451-PDB-SDP CLASS ACTION Honorable Paul D. Borman Magistrate Judge R. Steven Whalen

DEFENDANTS' OBJECTION PURSUANT TO RULE 72(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE REGARDING THE COURT'S FEBRUARY 18, 2010 ORDER

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure, Defendants Reddy Ice Holdings, Inc., William Brick, and Steven Janusek ("Defendants"), by their undersigned attorneys, hereby respectfully submit this objection to the Order of the Honorable Steven Whalen dated February 18, 2010. Specifically, Defendants request that this Court set aside the portion of the February 18, 2010 Order that strikes Exhibits D, F, and G to Defendants' Motion to Dismiss.

I. FACTS AND PROCEDURAL HISTORY

On December 17, 2009, Defendants filed their 12(b)(6) Motion to Dismiss. On January 19, 2010, Plaintiffs filed their Motion to Strike, seeking to exclude six exhibits attached to Defendants' Motion to Dismiss. The Court thereafter referred the Motion to Strike to Magistrate Judge Whalen for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A). Defendants subsequently filed their response to the Motion to Strike on February 2, 2010 and Plaintiffs replied on February 9, 2010. Following hearing, the magistrate judge issued an order

dated February 18, 2010 granting Plaintiffs' Motion to Strike "[f]or the reasons and under the terms stated on the record on February 18, 2010."

Magistrate Judge Whalen's ruling appears to rest on two bases. First, according to Judge Whalen, the disputed exhibits "go to disputed questions of fact that are more properly reserved for summary judgment." Hearing Transcript at 31 (attached hereto as Exhibit A). Second, the Asset Purchase Agreement ("APA," attached to Defendants' Motion to Dismiss as Exhibit F), which Judge Whalen referred to as "the first domino in the bunch," is not the only agreement referenced in the Complaint. Ex. A at 31–32. In particular, Judge Whalen noted the APA is "certainly a — something that's relevant to this case . . . I'll even say that it's probably integral, but it's not necessarily the only agreement." Ex. A at 31.

Defendants now object to the portion of Magistrate Judge Whalen's Order that strikes Exhibits D, F, and G as clearly erroneous.

II. STANDARD OF REVIEW

An order by a magistrate judge determining any non-dispositive pretrial matter referred to the magistrate under 28 U.S.C. § 636(b)(1)(A) must be reconsidered by a district court judge if the magistrate judge's order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); FED. R. CIV. P. 72(a). A decision is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Under Eastern District of Michigan Local Rule 72.1, a party objecting to a magistrate judge's decision must "specify the part of the order . . . to which the party objects" and "state the basis for the objection." E.D. MICH. LOCAL R. 72.1(d)(1)(A)–(B).

III. ARGUMENT: EXHIBITS D, F, AND G ARE CENTRAL TO PLAINTIFFS' CLAIMS AND SHOULD BE CONSIDERED IN DECIDING DEFENDANTS' MOTION TO DISMISS.

Because a plaintiff is under no obligation to attach to his complaint documents upon which his action is based, "a defendant may introduce certain pertinent documents if the plaintiff fails to do so." *Weiner v. Klais & Co., Inc*., 108 F.3d 86, 89 (6th Cir. 1997). Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document upon which it relied. *Id.* The need to consider pertinent documents from *both* sides is underscored by the fact this case is governed by the PSLRA, which requires Plaintiffs to offer facts sufficient to support a "strong inference" of scienter. *Tellabs v. Makor Issues & Rights, LTD*, 551 U.S. 308, 323 (2007). While a court evaluating a motion to dismiss must generally accept all of a plaintiff's allegations as true, when determining whether there is a strong inference of scienter, all reasonable inferences—favorable or unfavorable to the plaintiff—must be considered. *See id*. ("[I]n determining whether the pleaded facts give rise to a 'strong' inference of scienter, the Court must take into account plausible opposing inferences."). Accordingly, "to advance the purpose of the PSLRA, the Court should not adopt Plaintiffs' view of the facts without also considering the merits of [] Defendants' assertions." *Cardinal Health*, 426 F. Supp. 2d at 714–15. *See also Tellabs*, 551 U.S. at 323 ("The strength of an inference . . . is inherently comparative.").

In general, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Weiner*, 108 F.3d at 89. In addition, consideration of documents attached to a defendant's motion to dismiss, which "fill[] in the contours and details" of the plaintiff's complaint or "flesh[] out the allegations in the complaint" is appropriate and does not convert the

motion into one for summary judgment. *See Yeary v. Goodwill Industries-Knoxville, Inc.*, 107 F.3d 443, 445 (6th Cir. 1997) (noting consideration of materials that "simply filled in the contours and details of the plaintiff's complaint, and added nothing new" did not convert motion to dismiss into motion for summary judgment); *Rogers v. Detroit Police Dep't*, 595 F. Supp.2d 757, 766 (E.D. Mich. 2009) (noting that plaintiff's deposition, which was attached by defendant to motion to dismiss, "may be considered as fleshing out the allegations in the complaint and may therefore be referred to without converting the motion to a summary judgment motion"). Courts may also consider public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies. *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999). Finally, courts "may consider the full text of the SEC filings, prospectus, analysts' reports and statements 'integral to the complaint,' even if not attached, without converting the motion into one for summary judgment under Fed. R. Civ. P. 56." *Bovee v. Coopers & Lybrand, C.P.A.*, 272 F.3d 356, 360–61 (6th Cir. 2001).

Defendants object to the portion of Magistrate Judge Whalen's Order that strikes Exhibits D, F, and G as clearly erroneous.

Exhibit F

The APA (Exhibit F) is both referenced in the Complaint and integral to Plaintiffs' claims. Throughout the Complaint, Plaintiffs allege that Reddy Ice sold its assets in California and agreed not to compete in California, as part of an illegal, market allocation scheme. In particular, Plaintiffs allege that a consortium of companies acquired Reddy Ice's assets as a discrete transaction that was part of a broader conspiracy. In eight separate paragraphs, Plaintiffs refer expressly to this California transaction, which features centrally in the Complaint's alleged conspiracy. *See* Complaint at ¶¶ 15 ("Reddy Ice agreed not to compete . . . in the State of

California"), 43, 46 ("Reddy Ice had agreed to not compete against Arctic Glacier in California, and [] Arctic Glacier in exchange [] for the exclusive right to service California had agreed to 'stay out' of Arizona."), 49 ("Reddy Ice agreed to stay out of California . . . the unlawful agreement was entered into . . . around the same time that Reddy Ice sold most of its California ice plants"), 50 ("Reddy Ice agreed to sell its California manufacturing operations (except for a facility in Brawley, California that was near the border of Arizona) to a consortium of companies located in California"), 53 ("the consortium of companies that acquired Reddy Ice's manufacturing and distribution facilities in California was in fact a straw man set up by . . . Reddy Ice and Arctic Glacier"), 55 ("Reddy Ice and the consortium of companies entered into a 'written covenant not to compete'"), and 57 (noting "[t]he collusive agreement to allocate exclusive markets for packaged ice distribution and sale in California"). (For context, it may also be useful to recall that Arctic Glacier, after execution of the APA, acquired the consortium of California companies. Exhibit H.).

Exhibit F is indeed the transaction referenced above: it is an APA that involves the acquisition (by a consortium of California companies) of Reddy Ice's assets in California; the timing is correct (*i.e.*, the APA was executed prior to the confidential witnesses' employment with Reddy Ice); and the APA involves a covenant by Reddy Ice not to compete in California and a covenant by the California companies (which were later acquired by Arctic Glacier) not to compete in Arizona. But the fact which possibly most corroborates the APA as an agreement referenced by Plaintiffs is that it includes the same, very specific carve-out (assets located in Brawley, a city in Imperial County, California) alleged by Plaintiffs. *See* Exhibit F at 3 (Section 2.4: "Right of First Refusal for the Reddy Assets in Imperial County"); Complaint at ¶¶ 50, 55 (alleging the Brawley carve-out).

Even the Magistrate Judge's comments at the hearing confirm the centrality of Exhibit F to the Complaint. In particular, Magistrate Judge Whalen appeared to acknowledge the APA is an agreement to which Plaintiffs expressly and repeatedly refer. Ex. A at 31 ("It's certainly a — something that's relevant to this case . . . I'll even say that it's probably integral, but it's not necessarily the only agreement."). He emphasized, however, that the APA was merely one of several agreements alleged in the Complaint. *Id*. Defendants are aware of no legal precedent that would support exclusion of a document that is both integral and pertinent to the Complaint simply because it is not the only agreement alleged by Plaintiffs.

Finally, the PSLRA's stringent pleading burdens were established "to curb perceived abuses of the § 10(b) private action" such as "nuisance filings, targeting of deep-pocket Defendants, vexatious discovery requests and manipulation by class action lawyers." *Tellabs*, 551 U.S. at 320. Yet alleging a securities fraud case that survives a motion to dismiss would be a facile accomplishment if the plaintiff could hand-pick supportive documents, while omitting pertinent documents that permit competing (and negative) inferences. *See id*. at 323, 324 (noting the strength of an inference is "inherently comparative" and requiring courts' consideration of "opposing inferences") (noting inference of scienter "must be more than merely 'reasonable' or 'permissible'—it must be cogent and compelling, thus strong in light of other explanations"). Indeed, cherry-picking documents is not allowed. *See Weiner*, 108 F.3d at 89 (noting a defendant may introduce pertinent documents); *Cardinal Health*, 426 F. Supp. 2d at 714–15 (noting the court should consider the defendants' side when resolving a motion to dismiss). The APA is, for the reasons stated above, and as apparently recognized by Magistrate Judge Whalen, at the core of Plaintiffs' allegations and thus is proper for consideration in determining whether

Plaintiffs' securities fraud claims survive. In sum, it was clearly erroneous to strike Exhibit F from the Motion to Dismiss.

Exhibit D

If, as Judge Whalen noted, the APA is the "first domino," Exhibits D and G are stacked directly behind. Exhibit D, a press release issued by Easterly Investor Relations on behalf of Packaged Ice, Inc. on November 30, 2001 (the "Packaged Ice Press Release"), is a public document and discloses the Asset Purchase Agreement, which includes the "written covenant not to compete" that Reddy Ice entered into with the Mountain Water Ice Companies in 2001. Pursuant to *Weiner*, *Yeary*, and *Rogers*, documents that are central to the subject matter in the complaint and flesh out or fill in the contours and details of the plaintiff's complaint should be considered. Additionally, Plaintiffs appear to repeatedly allege the APA as one of several agreements that were secretively entered into, concealed from the public, and part of a collusive effort. *See* Complaint at ¶¶ 15, 20, 57, 72, 85, 91, 113, 114, 117, 121, 134, 139, 141, 142, 148, 149, and 179. Exhibit D thus helpfully provides discussion of the APA and illuminates a transaction that features centrally in Plaintiffs' allegations. Exhibit D is not being proffered to dispute facts about the APA, but simply to provide a full picture, and further indication, of the APA's execution. Accordingly, it was clearly erroneous to strike Exhibit D.

Exhibit G

It was also clearly erroneous to strike Exhibit G, excerpted pages from Reddy's Annual Report for the fiscal year ended December 31, 2001, which Packaged Ice, Inc. filed on Form 10-K with the SEC on March 8, 2002 (the "2001 10-K"). The Court may consider the full text of SEC filings regardless of whether they are attached to the Complaint so long as they are integral to statements within the Complaint. *Cardinal Health*, 426 F. Supp. 2d at 712; *Bovee*, 272 F.3d

at 360–61. The 2001 10-K discusses the APA (Exhibit G at 5) and Reddy Ice's practices with regard to business transactions—in particular, that Reddy Ice enters into covenants not to compete in "substantially all acquisitions." Exhibit G at 6. Again, Exhibit G does not contradict any of Plaintiffs' allegations regarding the APA—nor is it being offered for that purpose. It was clear error to strike Exhibit G.

IV. CONCLUSION

Plaintiffs' Complaint alleges, in substance, that Reddy Ice's public statements were incomplete and misleading to investors. Allowing documents referenced in or integral to the Complaint to be attached to the Motion to Dismiss will enable the Court to consider all public statements that are pertinent, rather than just those documents hand-picked by Plaintiffs, when determining whether the Complaint should survive the pleading stage. Exhibits D, F, and G are central to Plaintiffs' claims and thus should be considered in deciding Defendants' Motion to Dismiss.

For the foregoing reasons, Defendants respectfully request that this Court set aside the portion of the February 18, 2010 Order that strikes Exhibits D, F, and G.

Dated: March 4, 2010.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of "Defendants' Objection Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure Regarding the Court's February 18, 2010 Order" have been served on all parties of record via the Court's electronic case filing (ECF) system on this 4th day of March, 2010.

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EXHIBIT “A”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN CHAMBERLAIN, Individually, and on behalf of all others similarly situated,

Plaintiffs,

-v- Case No. 08-13451

REDDY ICE HOLDINGS, INC., WILLIAM P. BRICK, STEVEN J. JANUSEK, JIMMY C. WEAVER and RAYMOND D. BOOTH,

Defendants./

PLAINTIFFS' MOTION TO STRIKE EXHIBITS
BEFORE HON. MAGISTRATE JUDGE R. STEVEN WHALEN
United States Magistrate Judge
673 U.S. Courthouse
231 West Lafayette
Detroit, Michigan 48226

(Thursday, February 18, 2010)

APPEARANCES: LAUREN WAGNER PEDERSON, ESQUIRE
MARK S. DANEK, ESQUIRE
KARYN THWAITES, ESQUIRE
Appearing on behalf of the Plaintiffs.

JAMES R. NELSON, ESQUIRE
DOUGLAS C. SALZENSTEIN, ESQUIRE
Appearing on behalf of Defendants Reddy Ice, Brick and Janusek.

COURT RECORDER: NOT IDENTIFIED

TRANSCRIBED BY: MARIE METCALF, CVR, CM
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(TRANSCRIPT PRODUCED FROM DIGITAL VOICE RECORDING; TRANSCRIBER NOT PRESENT AT PROCEEDINGS)

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Detroit, Michigan

Thursday, February 18, 2010

At about 2:34 p.m.

* * *

DEPUTY COURT CLERK: All rise.

The United States District Court for the Eastern District of Michigan is now in session, the Honorable R. Steven Whalen, United States Magistrate Judge presiding. You may be seated.

The Court calls case number 08-13451, Chamberlain vs. Reddy Ice.

THE COURT: Good morning. Could I have counsels' appearances for the record, please?

MS. PEDERSON: Lauren Wagner Pederson for plaintiffs, Your Honor.

MR. DANEK: Mark Danek, Barroway Topaz, for plaintiffs.

MS. THWAITES: Karyn Thwaites, from Zausmer, Kaufman for plaintiffs.

MR. NELSON: James Nelson, DLA Piper for Defendants Reddy Ice, Brick and Janusek.

MR. SALZENSTEIN: Douglas Salzenstein of Honigman Miller for the same defendants, Your Honor.

THE COURT: Okay, good. Now, first, before we get started, I understand there's an attorney

to be sworn in; is that correct?

MR. DANEK: Yes, Your Honor.

THE COURT: Please step up to the lectern.

Who's being sworn in?

MR. DANEK: I am.

THE COURT: Oh, you're being sworn in?

MR. DANEK: Yes.

THE COURT: Okay. Do we have somebody moving for your admission?

MS. THWAITES: I am.

THE COURT: Why don't you step up also?

MS. THWAITES: Yes.

THE COURT: And could I have a card, if you could give that to my clerk?

MR. DANEK: Yes.

THE COURT: Thank you.

Go ahead, make your motion.

MS. THWAITES: I'm Karyn Thwaites. I'm an attorney in this district, and I'm moving for the admission of Mark Danek.

THE COURT: Okay, very good.

Okay, Mr. Danek, could you raise your right hand, please?

Do you solemnly swear under penalty of perjury that you will conduct yourself as an attorney and

counselor of this Court with integrity and respect for the law, that you have read and will abide by the civility principles approved by this Court and that you will support and defend the Constitution and laws of the United States?

MR. DANEK: I do.

THE COURT: Very good. I'll sign the card. And welcome to Detroit.

MR. DANEK: Thank you.

THE COURT: All right. We have before us the plaintiffs' motion to strike certain exhibits from the defendants' motion to dismiss.

So who's going to argue on behalf of the --

MR. DANEK: I am, Your Honor.

THE COURT: All right, Mr. Danek. Step right up to the lectern.

MR. DANEK: Good morning, Your Honor. The issue before the Court is whether documents outside the pleadings attached to defendants' motion to dismiss should be stricken from the record.

To start, I would like to give Your Honor a little background to the case. This is a securities class action based upon public statements issued by defendants.

Plaintiffs allege that defendants knowingly and recklessly omitted material information regarding nationwide illegal agreements between Reddy Ice and two of its key competitors in violation of U.S. antitrust laws.

The unlawful agreements alleged in the complaint sparked a slew of civil lawsuits pending before this court and resulted in an FBI raid of Reddy Ice's Dallas, Texas headquarters in connection with the United States Department of Justice antitrust investigation into Reddy Ice and its two key competitors.

In support of their motion to dismiss, defendant submitted a sworn affidavit from a named defendant that attempts to introduce authenticated evidence as if in support of a motion for summary judgment. The evidence submitted by defendants' attempts to prematurely raise a fact-based defense to the complaint. This is wholly improper.

THE COURT: It might be helpful -- I think there are six exhibits, I believe?

MR. DANEK: Yes, Your Honor.

THE COURT: Okay. It might be helpful -- and I understand the -- your overarching argument, and correct me if I'm wrong, is that this material is not objectively verifiable, it's not appropriate for judicial

notice and would be more appropriate for a summary judgment motion than for a 12(b)(6) motion.

MR. DANEK: Yes, Your Honor.

THE COURT: Does that pretty much sum it up?

At this point in your litigation has any discovery taken place?

MR. DANEK: No, Your Honor. Under the Private Securities Litigation Reform Act, upon the filing of a motion to dismiss, there's an automatic stay of all discovery.

THE COURT: Okay.

MR. DANEK: So we haven't had the opportunity to properly refute the documents.

THE COURT: Okay. It would probably be helpful to just go through them. And let's start with, I guess, Exhibit D, the first one. Which is a press release?

MR. DANEK: Yes, Your Honor. Exhibit D is a press release from November 2001. It was issued by Packaged Ice, which apparently was the defendant, Reddy Ice's predecessor company.

This document is not referenced anywhere in the complaint, nor is it integral to the conduct alleged by plaintiffs that occurred during 2005 through

2008.

This press release was issued in 2001 and the purpose for which it's being submitted is to raise a factual dispute with plaintiffs' allegations. So therefore, plaintiffs request that this document should be stricken from the record.

Exhibit E, Your Honor --

THE COURT: Go ahead, yeah.

MR. DANEK: -- is a May 2001 Packaged Ice press -- conference call transcript. Like Exhibit D, this document is also not referenced in the complaint. And it's also a private document. It's not objectively verifiable. And it also raises a factual challenge to plaintiffs' complaint. So therefore, plaintiffs request this document also be stricken from the record.

Exhibit F, Your Honor, is an asset purchase agreement between Packaged Ice and several other companies. This document is not specifically referenced in the complaint.

THE COURT: I think defendants' point was that -- and I'll let defense counsel speak to this, is that it was -- an agreement was woven into the -- allegations of an agreement were woven into the complaint.

MR. DANEK: Right.

Your Honor, what defendants essentially allege in their motion to dismiss is that Exhibit F is the entire illegal market allocation agreements that plaintiff allege in the complaint.

That is not the case. Exhibit F relates to --

THE COURT: So in your complaint, in your complaint, just so I'm clear on this, was this asset purchase agreement, Exhibit F, specifically referenced in your complaint?

MR. DANEK: No, it wasn't, Your Honor. We do acknowledge that plaintiffs do reference an asset purchase agreement as well as a written covenant not to compete in a handful of allegations.

But the way plaintiffs' allegations are set up is that that asset purchase agreement that was supplied to us by our confidential witnesses was executed in furtherance of the overall illegal nationwide market allocation agreement.

We like this document, Your Honor. It appears to buttress the information provided to us by our confidential witnesses. However, without the benefit of discovery, we have no way of knowing at this time whether or not Exhibit F is, in fact, what our confidential witnesses are referring to.

So therefore, it's just not properly before the Court at this stage of the litigation and we request that it be stricken.

THE COURT: Okay. G is portions of Reddy's annual report.

MR. DANEK: Yes, Your Honor. It's from a -- well, actually, it's from Packaged Ice's 2001 10-K. This is issued by Reddy Ice defendant's predecessor.

And just -- I'm not sure if you know this, Your Honor, but Packaged Ice was a public company until about 2003. It was then taken private. And then in 2005, it was taken public again and is now the -- the Reddy Ice Holdings that went public in 2005.

THE COURT: So this exhibit is for the year ending December 2001?

MR. DANEK: Correct.

THE COURT: When Packaged Ice was a publicly traded company, correct?

MR. DANEK: Correct. But it's not the current defendant in this case. It's -- it relates to a prior company. It's just not integral to conduct the plaintiffs allege that occurred between 2005 through 2008.

THE COURT: It is a public document?

MR. DANEK: It is, Your Honor. But

defendants are requesting that it be judicially noticed in furtherance of their fact-based defense.

Under *Cardinal Health,* it's not properly the subject of judicial notice if they request the Court to adopt a disputed fact as true. And that's why plaintiffs are asking that the Court strike this document.

THE COURT: Exhibit H, e-mail?

MR. DANEK: Yes, Your Honor. Exhibit H is a private e-mail received by Defendant Janusek.

As Your Honor is aware, an e-mail is inherently a private document. It's not objectively verifiable. It's not generally now within the territory of the Court. And also it's being submitted in furtherance of defendants' fact -- premature fact-based defense to plaintiffs' allegations. So therefore, we would request that it be stricken from the record.

THE COURT: And the last one is Exhibit K.

MR. DANEK: Yes. Exhibit K, Your Honor, is also a Packaged Ice 10-K from 1997.

As with Exhibit G, this is also from Reddy Ice's predecessor. It's not cited anywhere in the complaint. It's not integral to the parties' dispute.

And also, the purpose for which it's being submitted is to improperly raise a factual dispute with

plaintiffs' allegations. So therefore, plaintiffs request that the document be stricken from the record.

THE COURT: Okay. All right. Let me hear from the defendant and I'll give you a chance to respond, Mr. Danek.

THE COURT: Good morning.

MR. NELSON: Good morning, Your Honor.

Did you want me to present or do you have specific questions?

THE COURT: Why don't you go ahead -- I mean, just as a general principle and just sort of coming out of the gate, these exhibits do appear to be either outside of the complaint or supportive of fact-based arguments.

So are you asking that the Court take judicial notice of these exhibits?

MR. NELSON: We are not necessarily asking the Court to take judicial notice of these, Your Honor, because we don't think that's the only criteria by which the Court can consider additional documents in a motion to dismiss.

There are multiple criteria that allow the courts to consider documents in connection with a motion to dismiss.

And I would be remiss, Your Honor, if I

didn't raise the issue of the timeliness of the filing of the motion. I presume the Court has --

THE COURT: I have read that argument and the response. Apparently, the response to your motion was filed before the motion to strike. The response was filed, I think, on a federal holiday.

MR. NELSON: Yes, Your Honor.

THE COURT: So I'm aware of that argument. I'm going to take that under advisement.

But I think your time would be better spent really getting to the substance of the issue.

MR. NELSON: I assumed that to be the case, but didn't want to not mention the argument.

THE COURT: I appreciate that.

MR. NELSON: Your Honor, the law allows a court to consider in a 12(b)(6) motion a number of different types of documents, including documents that are referred to in plaintiffs' complaint and are central to the claims being made, including documents that fill in the contours and details of plaintiffs' complaint, including documents that are public records.

As a matter of fact, the *Cardinal Health* case, which plaintiffs cite, states specifically that SEC filings, prospectuses, analysts' reports can be included whether or not they are attached to the complaint.

A judicial notice is one means of allowing the Court to consider documents, but not the only means. We would suggest to the Court and urge the Court to consider some facts with regard to these particular documents.

I would first point the Court to the *Weiner* case out of the Sixth Circuit, which said a defendant may introduce certain pertinent documents if the plaintiff fails to do so, the purpose being so that a plaintiff with a legally deficient claim can not survive a motion to dismiss simply by failing to attach a dispositive document on which it relied.

So --

THE COURT: On which it relied?

MR. NELSON: Where I would like the Court to start --

THE COURT: Well, let's start with that proposition. Defendant -- or excuse me, the plaintiff fails to attach a document on which it relied.

Let's talk about the asset purchase agreement.

MR. NELSON: Yes, sir.

THE COURT: Because Mr. Danek indicated, "Well, okay, that exists. There was this purchase agreement, but that's not necessarily the full agreement

that was contemplated in the complaint, that there's a question of fact."

So how would you respond to his argument as to that asset purchase agreement?

MR. NELSON: The mere fact that it's not the only potential agreement referred to does not mean it's not central to their complaint, and does not mean it's not something that this Court should consider.

THE COURT: But how does that play into a 12(b)(6) motion which tests the sufficiency of the pleading?

MR. NELSON: The crux of their --

THE COURT: In other words, if you're -- and your motion to dismiss hasn't been referred to me. That will -- that's in front of Judge Borman. But if your argument is that this -- this exhibit defeats the claim in the complaint under 12(b)(6), isn't that a factual question?

MR. NELSON: I would submit it's not, Your Honor. I would submit it is being sure. Integral, as the Court is aware, is defined as necessary to completeness of the whole, or of pertaining to, or belonging as part of the whole.

The purpose of allowing documents integral to the complaint to be considered is so the Court has a

full picture, whether it's this Court or Judge Borman, has a full picture of the case.

This asset purchase agreement is, without question, if you look at the allegations in the complaint, one of the central agreements referred to in the complaint.

The plaintiffs alleged that this agreement existed based on a confidential witness and that it was not disclosed. And part of the argument on the fraud is it was not disclosed, it should have been disclosed. They referred to it as "unlawful," they referred to it as "secret," they referred to it as "illicit."

THE COURT: So you're saying that it's really beyond dispute that this exhibit, this particular agreement, is the agreement that's being referenced in the complaint?

MR. NELSON: I think that if you look at the pleadings, and I can reference the Court to the paragraphs, if the Court would like. We've done some of that in our filings.

But it is without dispute that that's what they're referring to, because they talk about an agreement entered into prior to the time the confidential witnesses came on board. They talk about the agreement.

If I may refer to the complaint, at

paragraph 15, Reddy Ice agreed not to compete with Artic Glacier in the State of California. And Arctic Glacier secretly agreed not to compete with Reddy Ice in the State of Arizona. That is precisely the noncompete that's in that agreement.

If we turn further to paragraph 46, had agreed not to compete against Artic Glacier in California, and Artic Glacier, in exchange, had the exclusive right to service California and had agreed to stay out of Arizona.

The -- 48, agreement between Reddy Ice and Artic Glacier to allocate territories.

Now, there is one point of, I think, confusion here, Your Honor, and that is, one, Packaged Ice was a predecessor of Reddy Ice. It owned Reddy Ice at the time of these agreements, Reddy Ice, Corp., having purchased Reddy Ice Corp. in 1998.

The agreement, that is, the asset purchase agreement, admittedly is with the Mountain Water Ice Companies, but the plaintiffs also addressed that. If we turn to paragraph 50, Reddy Ice agreed to sell its California manufacturing operations, except for a facility in Brawley, California that was near the border of Arizona, to a consortium of companies located in California.

That is precisely the asset purchase agreement. It seems to be more than a coincidence, Your Honor, that this alleged agreement that they say is a different agreement is -- has the same mutual noncompetes in it, has the same carved out in it for Brawley, California, took place before any of these confidential witnesses were part of or associated with Reddy Ice, and involves a consortium of California -- a consortium of companies in California.

That is that agreement. And therefore, they're alleging that Reddy Ice failed -- or Packaged Ice at that time, failed to disclose the agreement.

But the most important part is, Your Honor, the noncompete is ancillary to that agreement. They allege it to be unlawful, they allege it to be illicit, they allege it to be undisclosed.

In order for the Court, whether this Court or Judge Borman has the full picture of the complaint and the facts surrounding the complaint, it's just like referring to any other document in a complaint. We have the right to present the document.

As the *Weiner* court said, we don't want to be in a situation where a plaintiff with a legally deficient claim can survive a motion to dismiss by failing to attach a document on which it relied.

I think the remainder of the exhibits go to fill in the contours of the complaint and --

THE COURT: Let me ask this. And I know I'm jumping around a little bit, but --

MR. NELSON: Yes, sir.

THE COURT: Specifically with Exhibit G, which are portions of the annual report from 2001, and then Exhibit K, which are portions of the annual report, I think it's 1997, what is the significance of those two years relative to the complaint?

MR. NELSON: The Exhibit G, Your Honor, the significance is that it states, it discloses, again, the fact of this agreement.

If you look at, as filed, page seven of eleven of Exhibit G, under "dispositions," it specifically describes this asset purchase agreement, going to the allegation that it was not disclosed. We have a public document filed with the SEC that confirms it was disclosed. Again, trying to fill in the whole picture for the Court.

I would also point to the next page of Exhibit G, which references the fact that in substantially all acquisitions, we required the seller or its principal shareholders to enter into a covenant not to compete.

Which also goes to fill in the contours and flesh out the complaint, to use the words of the Sixth Circuit.

With regard to Exhibit H -- excuse me, Exhibit K, Your Honor, was that the other one you asked about?

THE COURT: Yes.

MR. NELSON: Exhibit K?

The point of that, if we turn to page eight of ten, as filed in the top paragraph, one of the allegations in the complaint was that the California consortium was a straw man.

Here is a public filing that lists competitors consisting of, including Mountain Water Ice, and serious competitors in the market, again putting -- filling in contours, putting flesh on the allegations, being sure the Court has the full picture of what was filed and what was disclosed, rather than the plaintiffs being allowed to pick and choose what goes into the complaint.

THE COURT: Exhibit H is an e-mail.

MR. NELSON: The purpose of Exhibit H, Your Honor, although it's attached to an e-mail, is the press release. It's attached to the e-mail, which is a public document. It begins on page three of that exhibit

as filed.

And we are offering that just to show that it was announced that Arctic Glacier actually purchased the California assets from -- and the California Ice companies, which is comprised of six companies and represents one of the leading independent manufacturers and distributors of packaged ice in California and one of the largest package ice companies in the U.S., calling it a market leader.

Again, offering it for the fact that this was, in fact, out there, truthful or not. I'm not offering it for the truth of the matter, but the fact that this statement was made in a public document, so that the Court again has the full picture. So the focus there is not on the e-mail; it's on the press release.

THE COURT: Okay. Then we had Exhibit E, which is the -- apparently the transcript of a conference call?

MR. NELSON: Yes, sir, Exhibit E.

I will point the Court first to page six of 35, and also to subsequent pages, page 20 and pages 24 and 26. One of the allegations in the complaint is that, as I said a moment ago, that the California Ice Companies were the straw man, and this was a deal to allocate territories and allocate customers.

This is a public document, because it's an earnings conference call, and it states the fact that Reddy Ice was losing money, was not making the money it thought it would in California, and provides again background or contours for the reasons for the sale that ought to be considered when deciding whether the allegation of a straw man is a sufficient allegation to get past a motion to dismiss.

THE COURT: Okay, thank you.

MR. NELSON: Thank you, Your Honor.

THE COURT: Mr. Danek, do you have any brief response?

MR. DANEK: Yes, Your Honor.

Your Honor, I'd first like to start with the standard for judicial notice. We're not saying that the SEC filings, press releases, anything objectively verifiable can not be properly judicially noticed.

However, under *Cardinal Health,* one of the qualitative factors to the judicial notice is whether or not the document requesting to be judicially noticed asked the Court to adopt a disputed fact as true.

As we explained in the briefing thoroughly, each of these six documents is asking the Court to adopt a disputed fact as true. That's the standard under *Cardinal Health.*

With respect to defendants' contours and details argument, defendants refly on three non-PSLRA cases, in which the Court did consider matters outside the pleadings.

THE COURT: I'm sorry, could you speak into the microphone there, so we can pick up your voice?

MR. DANEK: I'm sorry, Your Honor. It was the background. I don't know if you hear it up there, but it's kind of like an echo back here.

THE COURT: Oh, okay. We'll have to get our sound engineer in here.

MR. DANEK: Sorry about that.

THE COURT: Sue, we'll have you take care of that later.

Go ahead.

MR. DANEK: Well, the three cases that defendants have put forth as allowing them to have carte blanche with whatever they get to add to the plaintiff's complaints, the one case, *Yeary v. Goodwill Industries,* in that case, the parties simply supplied affidavits to the motion to dismiss, which simply verified the case, simply verified the complaint and did not add anything outside the pleadings.

THE COURT: Well, let me just interrupt you for a minute, because you -- I think at the top of

the row of dominoes here maybe is this asset purchase agreement, the Exhibit F.

MR. DANEK: Yes, Your Honor.

THE COURT: And defense counsel argues that while this agreement has to be the agreement that you're referencing in your complaint, how do you respond to that?

MR. DANEK: Well, how I respond to that, Your Honor, is that defendants are making a fact-based argument, they're claiming that Exhibit F defeats the pleadings. That's a factual inquiry, say, for a motion for summary judgment. You know, we asked the Court to open this case up for discovery so that we can --

THE COURT: Is Exhibit F, and I'm not asking you to try the case this morning or argue a summary judgment motion, but is Exhibit F subject to construction, factual construction, competing factual constructions?

MR. DANEK: I think it clearly raises the -- well, actually, the document is silent as to the territories where the assets are being sold. That's why defendants have to rely on all these other documents to construct their affirmative factual defense.

Also, Mountain Water Ice is not referenced anywhere in the complaint, and we're not sure whether the

-- we're not sure whether the companies listed in the asset purchase agreement are, in fact, what the other documents seem to refer to.

There's -- this document is just -- there's so many factual inquiries that we need to uncover in discovery that we would request the Court to convert the motion to summary judgment.

Just -- the document clearly raises -- for the purposes in which defendants are requesting judicial notice. It clearly asks the Court to adopt a disputed fact.

THE COURT: In your complaint, you did, I believe, refer to some 10-K forms; is that correct?

MR. DANEK: Yes. The public filings referenced in the complaint are the statements issued by Defendant Ready Ice between 2005 and 2008, that plaintiffs allege to be false and misleading.

The 10-Ks the defendants are requesting judicial notice of, the defendants are asking the Court to adopt a disputed fact as true, with -- in their SEC filings.

And I wanted to point the Court to the *Hennessy* case, which is cited by plaintiffs. In that case, the Court did not judicially notice a 10-K, because the fact in question in which the parties were seeking

judicial notice of, was reasonably in dispute, so therefore, the Court did not grant judicial notice to that 10-K filing.

THE COURT: Okay. Anything else? You have about 45 seconds.

MR. DANEK: Well, lastly, Your Honor, H&E, these are both private documents. They're not objectively verifiable. The facts for which defendants are submitting them clearly are submitted to raise a factual dispute with plaintiffs' complaint. We think they're better served for a summary judgment -- and also, I wanted to add, the plaintiff's motion is to strike not only the exhibits, but also relevant portions from defendants' motion and brief.

And if Your Honor permits, I'd like to approach the bench and give Your Honor a proposed motion and brief that has the relevant parts stricken.

THE COURT: You can hand that to my clerk. And it appears that the defendants just received a copy as well; is that right?

MR. NELSON: Yes, Your Honor.

THE COURT: Okay. Thank you, Mr. Danek.

MR. DANEK: Thank you, Your Honor.

MR. NELSON: May I respond briefly, Your Honor?

THE COURT: I'll give you 45 seconds.

MR. NELSON: Forty-five seconds will do.

THE COURT: Will that do it?

MR. NELSON: That will do it.

Counsel referred to *Cardinal Health,* Your Honor. I will point out two passages. In particular -- well, two passages.

One, on page -- well, on my copy it's page 26, but that's not correct. The *Cardinal* court said,

> "The Courts may consider the full text of SEC filings, prospectuses and analysts' reports regardless of whether they attach to the plaintiffs' complaint, as long as they are integral to the complaint."

Probably more importantly, if you look at --

THE COURT: Well, "integral to the complaint," he's saying -- Mr. Danek says, "Well, the 10-Ks that we are alleging that were false, weren't these. They were from 2005 to 2008."

MR. NELSON: But the bases they're suggesting they were false is this agreement from 2001.

THE COURT: I understand.

MR. NELSON: And the other point out of the *Cardinal* case, Your Honor, is on pages 714 to 715.

And it says,

> "In referring to striking an argument asserting that a witness had voluntarily resigned from Cardinal, the plaintiffs alleged that a source informed them that Jensen was forced to resign from Cardinal as a result of his involvement in the accounting fraud. Both sides present plausible arguments as to the reason Jensen left Cardinal.
>
> Therefore, to advance the purpose of the PSLRA, the Court should not adopt plaintiffs' view of the facts that also, considering the merits of Cardinal defendants' assertions, therefore, without adopting either side's assessment of why Jensen left Cardinal, the Court denies plaintiffs' motion to strike the arguments relating to that issue."

Therefore, again going back to the definition of integral, the information we submit in these exhibits is

integral because it makes part of the complete picture.

And as the *Cardinal* court itself held, that those should be considered because the Court should not adopt plaintiffs' view of the facts, without also considering the defendants' view of the facts.

THE COURT: Okay, thank you.

MR. NELSON: Thank you, Your Honor.

THE COURT: And I'm in a real indulgent mood today, and it is your motion, Mr. Danek, so you get the last word. But I'm going to give you 30 seconds.

MR. DANEK: Yes, Your Honor.

Briefly, Your Honor, at pages 714 in that case, the Court did grant plaintiffs' motion to strike a Newsweek -- Business Week on-line article, because it did raise that factual disputes of the courts would not judicially notice that document.

And regarding the PSLRA, in that case, the court did strike the other documents, so therefore, all the other documents were properly before the Court and therefore the documents were within the pleadings.

THE COURT: Thank you.

Well, defendants filed a motion to dismiss under 12(b)(6). We're all familiar with the purpose and the standards of the 12(b)(6) motion. It tests the sufficiency of the allegations in the complaint.

And of course recently the Supreme Court has issued two decisions that more completely set out the standards under 12(b)(6), that's *Bell Atlantic v. Twombly,* 550 U.S. at 544, and more recently, last year, *Ashcroft v. Iqbal,* 129 Supreme Court 1937.

But the difference between a 12(b)(6) motion and a Rule 56 motion for summary judgment is pretty simply looking at the complaints, and I recognize also looking at any factual material or exhibits that are referenced in the complaint, we determine whether it states a claim and which relief can be granted under summary judgment, which is -- occurs generally following discovery. You test the factual sufficiency of the complaint, as opposed to the legal sufficiency.

And I understand that there's some degree of overlap between those two considerations, but generally speaking, if there are disputed questions of fact, then I'm not -- I want to make it very clear this morning that I'm not ruling on the motion to dismiss. That's reserved to Judge Borman, of if he choses, to refer it to me. And I'm not prejudging it and I'm not ruling on that. I'm simply ruling on whether these six exhibits should be stricken or properly considered with the 12(b)(6) motion.

I've read the pleadings, I've listened to

the argument of counsel and I retain the opinion that what is being proffered in these exhibits does go to disputed questions of fact that are more properly reserved for summary judgment.

Let's start with the asset purchase agreement. Well, okay, that agreement is not specifically referenced in the complaint. It's out there. It's certainly a -- something that's relevant to this case, but it's also something that -- and I'll even say that it's probably integral, but it's not necessarily the only agreement. It's not necessarily an agreement that is beyond factual construction or beyond factual dispute. No discovery has taken place in this case yet.

And to consider that factual material, that document in the context of a 12(b)(6) motion that tests sufficiency of the complaint, would be, in fact, and to quote, 12(b)(6), it would be a matter outside the pleadings that would cause this to be treated as a motion for summary judgment.

Given what I consider the factual questions surrounding the asset purchase agreement that necessarily impacts the admissibility of some of the other exhibits, specifically G and K, and those are the pages from the annual report for the year ending 2001 and the year ending 1997.

Those are obviously outside the specific allegations in this complaint as to what reports are false and misleading. It was alleged the Reddy Ice's 2005 to 2008 reports were false and misleading.

But counsel indicated that the 2001 and the 1997 annual reports would go to the plaintiffs' allegation as to whether the asset purchase agreement was disclosed. Well, even assuming that these supported -- these exhibits supported a finding that Exhibit F, the asset purchase agreement, was disclosed, as I've indicated, there are factual issues surrounding Exhibit F. That's why I referred to it as the first domino in the bunch.

So again, as with those exhibits, we're looking at, I think, testing the factual sufficiency as opposed to the legal sufficiency.

The other exhibits, the e-mail, the transcript, likewise are more appropriately reserved for a summary motion. All of these exhibits, I think, would support fact-based defenses, but permitting these in the 12(b)(6)motion, without the opportunity for further discovery, for further amplification of what these exhibits mean and how they fit into the complaint, are factual questions.

So for that reason, I will grant the

plaintiffs' motion to strike Exhibits D, E, F, G, H and K of the defendants' pending motion for summary judgment, as well as references and arguments in the motion and brief itself that rely on those exhibits.

There's one thing I did neglect to mention, and that was defendants' argument concerning the timeliness of this motion. As I indicated, the motion to strike was filed a day later than the response to the motion. Apparently plaintiff had some confusion as to whether the Presidents' Day holiday was counted in the time in terms of the scheduling order.

It's not a jurisdictional issue. It's entrusted under the Federal Rules to the discretion of the Court to waive time. So I'm going to waive any time limits to the extent that they were violated. I'm a strong believer in really getting to the merits of a motion.

And in any event, under a motion to strike, I could actually consider that sua sponte. I could raise that on the Court's own motion as well. So I'll grant the motion, notwithstanding the apparent one day late filing of the motion to strike.

With that, I'll issue a written order today incorporating my comments on the record.

And I was just handed a redacted version

of the motion to dismiss. What I will do is, based on my ruling, and I haven't had a chance obviously to look at this, and I don't know if defendants' counsel has had a chance to really look at this either, but what you can do -- have you?

MR. NELSON: We have not, Your Honor.

THE COURT: You have not, okay.

So rather than just accept this without looking at it, I'll ask both counsel to go over this in light of my ruling and -- I'm actually not sure if it's even necessary to do that, because my ruling is that the exhibits are gone and arguments based on the exhibits are gone. And I think Judge Borman can sift through that.

But I'll certainly permit counsel to submit a redacted copy. But I'm going to leave it to counsel to review this, agree that it's properly redacted. And if you can do so, you can file that.

Certainly, if either party wants to contest my ruling today, you have 14 days from today to file objections in front of Judge Borman.

Okay, I'll issue a written order. Thank you, very much.

MR. DANEK: Thank you, Your Honor.

MR. NELSON: Thank you, Your Honor.

DEPUTY COURT CLERK: Court is in recess.

(Court in recess at 10:49 a.m.)

* * *

C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter and has been prepared by me or under my direction.

\s\Marie J. Metcalf 03/02/10

Marie J. Metcalf, CVR, CM (Date)